PRIVY COUNCIL.

JATINDRANATH CHAUDHURI

v.

UDAYKUMAR DAS.

P. C.*
1931

Jan. 16;
Feb. 6.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Privy Council Practice—Variation of Order in Council—Order not in accordance with judgment—Further appeal determined on varied order—Decree in Letters Patent Appeal varying decree of High Court—Separate appeals to Privy Council.

Upon the petition of the appellant in one of two consolidated appeals of 1929 from a decree of the High Court, the Judicial Committee advised that the Order in Council, made in 1924, upon a previous consolidated appeal, in which the petitioner had been an appellant and the respondents the same as in the 1929 appeal, should be varied, as it did not give effect to the intention expressed in the judgment then delivered; the variation to be subject (by consent) to the condition that the recovery of sums paid under the original Order should not be sought. The appeal of 1929 was then heard and allowed, effect being given to the Order as varied.

It is desirable that in some manner recourse to two appeals to the Privy Council should be avoided where one is from a decree of the High Court made under section 98(2) of the Code of Civil Procedure and the other from the decree in a Letters Patent Appeal varying the former decree.

CONSOLIDATED APPEAL (No. 97 of 1929) from two decrees of the High Court (February 10, 1927) varying two decrees of the Additional Subordinate Judge of Khulna (May 13, 1925); and petition by the appellant in the second of the above consolidated appeals to vary an Order in Council, dated December 17, 1924, in Privy Council Appeals Nos. 134 and 135 of 1923.

The two suits, out of which the consolidated appeals arose, were suits for arrears of rent and cesses, including interest, for the same tenures, but for different periods.

The decree of the High Court, which varied the decree of the trial judge, gave effect to the Order in Council of December 17, 1924, made in a previous appeal relating to the same tenure.

**Present:* Lord Atkin, Lord Thankerton, Lord Macmillan, Sir George Lowndes and Sir Dinshah Mulla.

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Katyayani Debi Chaudhurani, who was the appellant in the second of the present consolidated appeals and had been an appellant in the previous appeal, in which the respondents were the same as in the present appeal, petitioned that the Order in Council, dated December 17, 1924, should be varied on the ground that it did not give effect to the judgment of the Board delivered on December 11, 1924.

The facts appear from the judgment of the Judicial Committee.

The petition and the present appeal were heard together.

Wallach for the petitioner and for the appellants. Reference was made to *Lajwanti* v. *Safa Chand* (1).

The respondents did not appear.

The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal by the defendant from a judgment of the High Court of Calcutta in a suit brought by the plaintiff to recover rent. There is also before their Lordships a petition by the defendant in two former appeals before this Board to reform the Order in Council then made, on the ground that it does not give effect to the intention of their Lordships as expressed in their judgment. These are the latest incidents in a series of legal proceedings which, owing mainly to the fault of the parties, have not had entirely satisfactory results.

It will be necessary to state in outline so much of the previous history of the case as must be known to elucidate the present issue between the parties. In 1878, the predecessor-in-title to the plaintiff granted a lease to the predecessor of the defendant of a considerable portion of land estimated at about 4,000 *bighâs*. The land was mainly uncultivated; the tenant was to bring it into cultivation within three years. For that period, he was to hold it rent free; afterwards he was to pay 13 annas per *bighâ* rent.

(1) (1925) I. L. R. 6 Lah. 388; L. R. 52 I. A. 211.

It was a permanent transferable tenure at a fixed rent. The landlord purported to give possession to the tenant of the whole area as defined in the lease. Part of the area was said to include the *mouzâ* Daskati; but, though the tenant took possession of the whole *mouzâ*, 61 acres was not the property of the lessor but of another owner, one Haricharan Chaudhuri. In 1888, Chaudhuri dispossessed the then tenant, not only of the 61 acres, but also of a much larger tract to which Chaudhuri had no title. In September, 1917, the plaintiff, the then lessor, brought a suit for rent against the defendant, Katyayani Debi, the then lessee, for rent for the year 1915-16, and in June, 1918, he brought a similar suit for the rent for the year 1916-17. The defendant had acquired the tenure as a purchaser at a sale in execution of a decree for arrears of rent against a former tenant. She was the wife of Haricharan Chaudhuri, who, at the time when she had bought in 1894, still was in possession both of the 61 acres and the larger tract referred to. Her defence in both suits was that she was entitled to a suspension of all the rent, seeing that she had not received possession of the land included in the tenure, but possessed by her husband, and that she was entitled, at any rate, to an abatement of the rent proportionate to the land included in the tenure, but possessed by her husband. Both suits were tried together. The Subordinate Judge refused total suspension, but gave her the abatement asked for. The tenant appealed to the High Court, and the lessor preferred cross-objections.

The two learned Judges, who heard the appeal, gave judgment on the 31st May, 1921. They agreed with the Subordinate Judge as to suspension, but differed as to abatement. Woodroffe J. agreed with the Subordinate Judge. Cuming J. agreed to an abatement as to the 61 acres, but thought the tenant not entitled to an abatement in respect of the larger tract on which the husband was a trespasser. The Judges having differed, the decree of the Subordinate Judge was affirmed.

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The tenant appealed to the Privy Council against the unanimous part of the decision of the High Court refusing suspension of rent. The lessor appealed to the Full Court by way of Letters Patent Appeal against the decision, which allowed abatement of the whole tract possessed by the husband.

On the Letters Patent Appeal, the High Court gave judgment on the 27th February, 1922. They affirmed the view taken by Cuming J. They stated, in their judgment, that the husband was the proprietor of the 61 acres, but as to the rest of the tract they pointed out that the husband had no lawful title, and that he could not acquire a title against the lessor by adverse possession during the continuance of the lease. Their decree, however, directs payment of rent for the whole block of land in Daskati possessed by the husband, described as plots C, D and D (1) in the map of the Commissioner, and gives no abatement, therefore, in respect of the 61 acres, to which the lessor had no title, and of which the lessee had not possession. This was probably due to inadvertence, but as the learned Judges made reference, in the judgment, to a clause in a compromise agreement with a former tenant, by which he bound himself not to claim abatement on any ground in respect of a specified area, it is possible that the decrees accurately represented their intention. The latter point becomes immaterial in view of the judgment of this Board now to be mentioned.

The tenant in turn appealed from the decision in the Letters Patent Appeal to the Privy Council. Treating the two rent suits as one, there were thus now two appeals to the Privy Council, one from the two Judges who had decided partly in favour of the defendant and one from the Full Court who had decided wholly against the defendant. Certificates of leave to appeal in both appeals were given on the same day, the 12th May, 1922.

It is, of course, anomalous that there should be two appeals proceeding at the same time, one from

the lower court and one from the higher court which had already varied the order of the lower court. The anomaly is possibly due to a doubt which has existed as to the power of the court under Letters Patent Appeal to do more than deal with so much of the case as has been the subject of difference in the court below. It seems to their Lordships desirable that, in some manner, the recourse to two appeals to the Privy Council in such cases should be avoided.

The two appeals proceeded, they were heard together, and judgment was delivered on the 11th December, 1924. In their Lordships' judgment, it was mentioned that the appellant had obtained possession of the whole lands within the boundaries mentioned in the lease with the exception of a small area of 61 acres to which the husband had a paramount title, and a much larger area in respect of which he had no title. Their Lordships state, "It "is conceded that she is entitled to an abatement of "rent applicable to the 61 acres above referred to, "and this has been allowed by the judgment under "appeal." As has been said, this was a misapprehension. Later on, their Lordships proceed to discuss a clause in the lease, on which the defendant relied, and say it "may be held to cover the "dispute with regard to the 61 acres of land that "have been duly investigated and in respect of which "an abatement of rent corresponding to the area has "been made." They express entire agreement with the judgment of the High Court, and advise that the appeal should be dismissed with costs. They state that they are not at present satisfied that what they call an alternative ground of judgment based on the compromise is well founded, but express no final opinion upon the matter. The Order in Council dated the 17th December, 1924, as drawn up, directs that the appeals should be dismissed and the decrees of the High Court, dated 31st May, 1921, and the 27th February, 1922, be affirmed. It appears to their Lordships plain that this Order does not carry out the intention of the members of the Board as expressed

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in their judgment. In the first place, it affirms the decree of the 31st May, 1921, which gave the defendant an abatement in respect of the larger tract as well as the decree of the 27th February, 1922, which disallowed that abatement. In the second place, their Lordships clearly intended the defendant to receive an abatement in respect of the 61 acres, and would not have affirmed absolutely the decree of the 27th February, 1922, had it been brought to their notice that it did not give the defendant the abatement to which they thought she was entitled.

The jurisdiction of the Board to recommend the alteration of a former Order in Council, on the ground that by inadvertence it does not give effect to the intention of the Board as expressed in their judgment; is undoubted. It appears to their Lordships that it should be exercised in the present case in order not to defeat the manifest rights of the defendant which were intended to be effectuated by the former decision of the Board.

Once this is made clear, the position of the parties in the present suits is free from doubt. The present appeals are in respect of suits for rent brought in continuance of the suits which reached the Privy Council. The first was brought on the 26th March, 1919, for rent for the year 1918-19; the second, on the 21st March, 1923, for the three years 1919-20, 1920-21, 1921-22. The appellant in the second suit is a member of the tenant's family, in whom, by arrangement between themselves, the tenure is vested. The defendant in the suits raised all the defences which were set up in the former suits. They stood over for ultimate decision until the hearing by the Privy Council. After that decision, the only defence relied on was the claim for abatement as to the 61 acres. The learned Subordinate Judge thought that the judgment of the Privy Council justified him in giving effect to the claim for abatement, and awarded interest on the balance, *pendente lite*, at 6 per cent. per annum. On appeal to the High Court, the learned Judges relied on the terms of the ultimate

decree, refused abatement and allowed interest, *pendente lite*, at 12 per cent. The defendant appeals from this decision, both as to the abatement and as to the interest. It follows from what has been said that the defendant is entitled to the abatement asked. As to the interest, the amount to be allowed is very largely a matter of judicial discretion, and their Lordships see no reason for interference with the discretion exercised by the Subordinate Judge.

Their Lordships are of opinion that the Order in Council, dated the 17th December, 1924, should be amended by deleting the words "the decrees of the "High Court of Judicature at Fort William in "Bengal dated respectively the 31st day of May, 1921, "and the 27th day of February, 1922, affirmed," and substituting therefor the words "the decree of the "High Court of Judicature at Fort William in "Bengal, dated the 27th day of February, 1922, ought "to be varied by allowing the appellant an abatement "of rent and interest in respect of 61 acres of land "and subject to such variation ought to be affirmed." In the appeals, they are of opinion that the appeals should be allowed and the decree of the Subordinate Judge, dated the 13th May, 1925, be restored. In the circumstances, they do not think that either party is entitled to costs, either in the High Court or before the Board. They desire to add that counsel for the appellant very properly intimated that his client would not seek to recover any moneys which may have been paid to the plaintiff under the decrees affirmed by the Privy Council, and they recommend the variation of the Order subject to this condition.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *W. W. Box & Co.*

A. M. T.